In The

Supreme Court of the United States

October Term, 1978

No. 78-414

UNITED AIR LINES, INC.,

Petitioner,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the complaints of LINDA MORTIMER and MIROSLAWA ROSENFELD,

Respondents.

BRIEF OF RESPONDENT MIROSLAWA ROSENFELD IN OPPOSITION

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Jurisdiction

The order of the New York Court of Appeals was entered on June 13, 1978. The petition for a writ of certiorari was filed by United Air Lines, Inc. ("United") on September 11, 1978. The jurisdiction of this Court was invoked under 29 [sic] U.S.C. Section 1257(3). (Pet.12).

United's claim that state regulation in this field is pre-empted by federal regu-

lation (Pet. 10) was not raised in the state administrative agencies below. According to the Petition (p.7), United's claim that state regulation posed a potential conflict with federal regulation under Title VII was not raised until the initial appeal from the decision of the Human Rights Division below.

Statutes Involved

The New York State Human Rights Law, Executive Law §296, provides in pertinent part:

> "1. It shall be an unlawful discriminatory practice:
>
> (a) For an employer...because of the...sex...of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

The applicable provisions of the New York State Human Rights Law, Executive Law §298 are as follows:

> "No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances...The findings on which such order [of the Division] is based shall be conclusive if

> supported by sufficient evidence on the record considered as a whole."

The relevant portions of Sections 601 (a) and (b) of the Federal Aviation Act of 1958, 49 U.S.C. §1421(a) and (b) are as follows:

> "(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> (5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and
>
> (6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.
>
> (b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make

classifications of such standards, rules, regulations and certificates appropriate to the differences between air transportation and other air commerce."

Section 708 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-7, provides:

"Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

Section 1104 of Title XI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000h-4, provides:

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

Questions Presented

1. Whether the decision of the New York State Division of Human Rights finding that United's mandatory pregnancy leave policy for flight attendants based in New York contravenes state prohibitions against sex discrimination, which is consistent with the decisions of three Federal District Courts under Title VII and the policies of at least two other air carriers, and which comports with express FAA policies, is in conflict with Title VII or any other law of the United States.

2. Whether the sexually discriminatory employment policies of an employer which employs persons within the state of New York are exempt from a regulation by New York State by virtue of the employer's participation in interstate commerce where Congress has expressly deferred to state regulation in this field; such regulation does not burden interstate commerce; and the petitioner offered no evidence of such burden below.

3. Whether the Court has jurisdiction to issue a writ of certiorari where petitioner's claims were not properly advanced in the original proceedings below.

Statement

a. Background.

Respondent Miroslawa Rosenfeld is a New York State resident who has been employed as a flight attendant by United since 1967. At all relevant times she has been based in New York State and covered by applicable New York State regulation with respect to disability, workers compensation, unemployment insurance, employment discrimination and the like. In March 1974, respondent learned that she was pregnant and so advised her supervisors. Pursuant to United's mandatory leave policy (Pet. 4),* respondent was immediately placed on a mandatory pregnancy leave, without right to accrued sick leave or disability benefits. At the time respondent was ten weeks pregnant and had experienced no difficulties in work performance. No company medical examination was conducted to contradict the findings of Ms. Rosenfeld's obstetrician that she was in good health and capable of performing all flight duties. (Pet. App. A4-A5).

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*Page references to the Petition for a Writ of Certiorari are cited as "Pet." References to the Appendix to the Petition are cited as "Pet.App.A" References to the Appendix to this Brief are cited as "A".

b. Proceedings in the New York State Human Rights Division.

Following the inception of the mandatory maternity leave, Ms. Rosenfeld filed a complaint with the Human Rights Division asserting that United's imposition of a mandatory leave and denial of benefits during the leave each constituted discrimination on the basis of sex within the New York State Human Rights Law, Executive Law §296 (Pet.App. A4). A full hearing was held on the complaint of Ms. Rosenfeld before a hearing examiner of the State Division of Human Rights on June 10, 1974, January 15, 1975 and March 21, 1975. United appeared and defended. United's sole defense was that the mandatory maternity leave policy was a bona fide occupational qualification ("BFOQ") based on the safety responsibilities of flight attendants on United's aircraft (Pet. 607). Both parties introduced medical and other testimony.

Based on the record testimony, the Human Rights Division found that Ms. Rosenfeld was placed on maternity leave by United without conducting or considering any medical examination as to her fitness or eligibility to continue work as a flight attendant during that stage of her pregnancy. The Division further found that she was placed on leave "at a time when there was no evidence that she was unable to perform all her duties as a flight attendant," and that United "created an irreputable presumption, not justified by the testimony in this case, that pregnancy at any and every stage renders a stewardess unsafe to fly." The Division concluded that United's maternity leave policy

"discriminates against females in general and Complainant in particular in that it singles out pregnancy for different treatment than any other physiological condition." (Pet.App. A5-A6).

In addition to medical and related testimony, the policy of the Federal Aviation Administration ("FAA") with respect to continued service of flight attendants during pregnancy was placed in evidence. The Division determined that the evidence showed that the FAA does not require air carriers to automatically place pregnant flight attendants on maternity leave, but, rather, suggests that the issue be handled on an individual basis. (Pet. App. A5).

The Division rejected United's sole defense, as unsupported by the evidence, that its maternity leave policy was a BFOQ (Pet.App.A5). Therefore, the Division ordered United to permit flight attendants to fly until their twentieth week of pregnancy provided that, if requested, the pregnant flight attendant would produce a semi-monthly confirmation from her own physician that her performance of flight attendant duties would not pose a health or safety hazard, and to permit flight attendants to fly from the twentieth to the twenty-eighth week of pregnancy unless United should find, as a result of a medical examination by United's physicians, that performance of flight attendant duties would pose such a hazard. The Division permitted United to disqualify flight attendants from flying without regard to their physical condition during and after the twenty-eighth week of pregnancy. The Division also ordered United to make Ms.

Rosenfeld whole for lost work and to provide accrued sick leave and disability benefits to female employees for pregnancy-related disabilities to the same extent provided to employees for other types of temporary physical disabilities. (Pet.App. A7-A8).

c. Proceedings in the New York Human Rights Appeals Board and the Courts of the State of New York.

United appealed the order of the Human Rights Division to the Human Rights Appeals Board, which heard oral argument and unanimously affirmed the order of the Division. (Pet. App. A21-A22).

Thereafter, United appealed to the Appellate Division for the Second Department of the New York Supreme Court. The Court consolidated the cases of Ms. Rosenfeld and Linda Mortimer and heard oral argument by all parties. The Appellate Division unanimously affirmed the Human Rights Division's findings and order. (Pet. App. A25-A28).

United then moved the Court of Appeals of the State of New York for leave to appeal. The Court of Appeals denied United's motion for leave to appeal on June 13, 1978. (Pet. App. A29).

ARGUMENT

The decisions below do not conflict with any applicable federal statute but comport with the determinations of federal courts and the Federal Aviation Administration. Nor are state employment discrimination laws pre-empted by federal regulation. Moreover, neither of the petitioner's claims in support of the petition was properly advanced or supported in the administrative agencies below. In all respects, this Court lacks jurisdiction under 28 U.S.C. §1257(3) and the petition should be denied.

1. The Order Below Does Not Conflict with Federal Law.

United does not challenge the Human Rights Division's finding that under New York State Law United's mandatory maternity leave policy is illegal and unjustifiable sex-based discrimination. Apparently United is also not seeking review of the Division's order with respect to the payment of sick leave and disability benefits. Therefore, these issues are not before the Court.

United asks that the writ be granted because after the Human Rights Division found that United's pregnancy leave policy violates the State Human Rights Law, a federal Court found that this policy does not violate Title VII of the Civil Rights Law of 1964, as amended, 42 U.S.C. §2000e et seq., Condit v. United Airlines, Inc., 13 FEP Cases 689 (E.D. Va. 1976), aff'd 558 F.2d 1176 (4th Cir. 1973), cert. denied ___U.S.___, 98 S.Ct. 1510(1978). There is no conflict between these

decisions, since Condit does not require United to maintain a mandatory pregnancy leave policy for flight attendants, but only found that such policy does not contravene Title VII standards. The Court of Appeals in Condit did not hold otherwise but affirmed solely on the basis that the findings of the trial court were not clearly erroneous. Both Titles VII and XI of the Civil Rights Law of 1964 recognize that fair employment law is the permissible domain of states and local governments. See 42 U.S.C. §2000e-7 and 42 U.S.C. §2000h-4.

The Condit decision does not determine that United's mandatory pregnancy leave policy is required by the Federal Aviation Act; observance of the Human Rights Division decision can not conflict with applicable federal safety legislation. Indeed, as found by the Division, the FAA does not require air carriers to automatically place pregnant flight attendants on maternity leave, but, rather, suggests that the issue be handled on an individual basis. (Pet. App. A5).

This determination by the Division accords with the decision of the U.S. District Court for the Eastern District of Virginia in Burwell v. Eastern Airlines, Inc. ___F.Supp.___, No. 74-0418-R (E.D. Va. September 6, 1978), appeal pending, which held that FAA regulations do not require a policy of mandatory maternity leave upon knowledge of pregnancy or even suggest that it is advisable.

Moreover, other air carriers governed by the FAA have not required mandatory leave upon knowledge of pregnancy for their flight attendants and received

no adverse reaction by the FAA. As noted in other decisions Northwest Airlines, Inc. does not impose such a policy. In re National Airlines, Inc., Maternity Leave Practices and Flight Attendant Weight Program Litigation, 434 F.Supp. 249, 259-260 (S.D. Fla. 1977). Ozark Airlines, Inc. recently entered into a Consent Decree eliminating this policy as well. A copy of the Consent Decree is in the Appendix hereto (A.1a-5a).

The federal courts have found other air carriers' mandatory maternity leave policies invalid under Title VII, both before and after Condit. Burwell v. Eastern Airlines, Inc., supra; MacLennan v. American Airlines, Inc., 440 F.Supp. 466 (E.D.Va. 1977) appeal pending; In re National Airlines, Inc., Maternity Leave Practices and Flight Attendant Weight Program Litigation, supra. The fact that in MacLennan and Burwell the judges reached findings opposite those in Condit after Condit was affirmed also illustrates that the findings of each tribunal are subject to review only according to the standards applicable to that proceeding. As the Court observed in Burwell, supra, a split in the courts on the issue of mandatory maternity leave under Title VII is not surprising since every case must be decided on the evidence presented in that particular case and the Court of Appeals did not even express agreement with the District Court's findings of fact in Condit.

2. The State Agency's Order Does Not Impose An Undue Burden on Commerce.

United contends that the implementation of the state agency's order would cause an undue burden on commerce "by intruding into an area in which uniformity of operation on a nationwide basis is essential." (Pet. 10). This argument is without merit.

There is absolutely no evidence of record to support United's claim of undue burden and none was ever offered by United. In effect, United is now asking the U.S. Supreme Court to make a factual determination with respect to possible burdens on commerce which United never asked the Human Rights Division to make.

The Human Rights Division decision regulates United's maternity leave policy only with respect to United's flight attendants based in New York. Flight attendant duties are unchanged by pregnancy. There is thus no reason why United cannot observe the laws of New York State as to its employees based in New York without confusion to its flight operations. Moreover, United's employees in New York are entitled to the same protection of that State's laws as are other employees in New York.

Under our constitutional scheme, the states retain broad power to legislate protection for their citizens. See DeCanas v. Bica, 424 U.S. 351 (1976); New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973). Employment practices have traditionally been a subject of state legislation, as is evidenced by state work compensation laws and the like. Simpson v. Alaska State Commission for Human Rights, 423 F.Supp. 552

(D.Alaska 1976). Indeed, Title VII expressly recognizes state regulation of fair employment practices and disavows any intent to "occupy the field." See 42 U.S.C. §2000e-7, §2000h-4. Significantly, there is no provision in Title VII for exempting from state regulation employers, as United, engaged in providing transportation service across state lines. The Human Rights Division's order is merely an exercise of the power reserved to the states which, although it may touch upon the conduct of interstate commerce, does not burden interstate commerce. De Canas v. Bica, supra at 356-357.

Thus, United has no basis for raising a question of violation of the Commerce Clause of the U.S. Constitution since United has not shown that the Human Rights Division's order places an undue burden on commerce.

3. Neither the Claim Under the Supremacy Clause Nor the Claim Under the Commerce Clause Were Raised Before the Human Rights Division.

United never raised the claim before the state agency that an undue burden on interstate commerce would result from granting the relief sought by Ms. Rosenfeld. There was no evidence whatsoever in the record to support this claim. Similarly, United indicates that it first raised the claim of a potential conflict between state regulations and Title VII which would contravene the Supremacy Clause in the Human Rights Appeal Board. (Pet. 6-7).

The New York State Human Rights Law, Executive Law §298 provides that failure to assert a claim in prior proceedings precludes consideration of that claim by a court, absent extraordinary circumstances. United has neither raised its claims before the proper state agency nor shown extraordinary circumstances as required by the state statute. Under state law, United improperly asserted these matters on appeal to the state courts.

The U.S. Supreme Court does not consider claims brought on a petition for a writ of certiorari where those claims were not first raised in a trial court or similar fact-finding forum. Tacon v. Arizona, 410 U.S. 351 (1973). Thus, under federal law as well as state law, United's claims under the Supremacy Clause and Commerce Clause of the U.S. Constitution cannot now serve as a basis for granting United's petition.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
Plaintiff,	)	No.
v.	)	74 C 1470
OZARK AIR LINES, INC.,	)	
Defendant.	)	

CONSENT DECREE

On May 29, 1974, plaintiff Air Line Pilots Association, International ("ALPA"), filed a complaint charging defendant Ozark Air Lines, Inc. ("Ozark"), with engaging in sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e ("Title VII") by reason of Ozark's weight standards policies and maternity leave of absence policies, including the alleged denial of employment opportunity upon pregnancy and the alleged denial of sick leave and other benefits. The Complaint sought injunctive and other relief on behalf of ALPA and female flight attendants who may have been or would be adversely affected by the acts and practices alleged.

Ozark denies engaging in any activities

violative of Title VII or any other equal employment law. The parties, however, wishing to fully and finally resolve all maternity-related issues raised by the complaint without the time and expense of further contested litigation, consent to the entry of this Decree.

It appears to the Court that the entry of this Decree will further the objectives of Title VII, and this Decree is being entered with the intent and purpose of fully and finally resolving all maternity-related issues and claims raised by the Complaint.

Now, therefore, it is hereby ORDERED, ADJUDGED, and DECREED, as follows:

I. General

1. This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against defendant under Title VII as to all issues resolved herein.

2. Neither the agreement to entry of this Decree nor anything in this Decree or accomplished thereby shall be construed to be, or shall be, admissible in any proceeding as evidence of an admission by defendant of any pattern or practice of resistance to the full enjoyment of rights under Title VII, or any violation of, failure to comply with, or interference, or obstruction of compliance with Title VII, as amended, or any other equal employment law, and Ozark expressly denies engaging in any activities violative of the law.

3. As to those issues between plaintiff and defendant relating to alleged acts and practices of discrimination by the defendant which are resolved by this Decree, and, with respect to such matters, compliance with this Decree shall be deemed to be compliance with Title VII.

II. Maternity and Weight Issues

1. A flight attendant shall, upon knowledge of her pregnancy, promptly notify the company. A flight attendant who intends to return to work at the conclusion of her pregnancy shall be granted a maternity leave of absence providing she applies for such leave before the end of the first trimester.

2. A pregnant flight attendant who meets all the qualifications for her job and whose doctor has certified she is fit for duty shall be allowed to continue working for a period not to exceed the 24th week of pregnancy, provided however, in the period from the end of the first trimester to the 24th week of pregnancy the company may require certification from a physician of its choosing before the flight attendant may perform her flight duties. Any dispute over the right of a flight attendant to continue flying under the provisions of this paragraph shall be subject to Section 19 of the collective bargaining agreement.

3. Flight attendants on maternity leave shall retain and accrue seniority during such leave. The flight attendants shall retain and continue to accrue longevity (for base pay or salary purposes) for the first six months of such leave,

but thereafter longevity shall not accrue.

4. Maternity leaves shall be granted for the duration of pregnancy and six months beyond termination of pregnancy. If a flight attendant needs extra time, she may request an extension within the six month period and if it is supported by medical justification from her physician, subject to verification by a physician selected by the company, it will be granted. A flight attendant on maternity leave shall be entitled to return to active employment after termination of her pregnancy within the period of her leave, upon giving the company thirty days notice in writing prior to returning and certification by her doctor that she is able to return to work, subject to meeting the normal company requirements for her job, passing a company physical exam, and completing any required training without pay. Any dispute over right to return to service will be handled in accordance with Section 19 of the collective bargaining agreement.

5. The seniority and longevity of currently employed female flight attendants who have previously taken maternity leave and not received seniority and longevity credit as provided by Section II Paragraph 3 of this Decree, shall be adjusted on a case by case basis after review of personnel files based upon the provisions of Section II, Paragraph 3 of this Decree. The parties shall meet within 90 days from entry of this Decree for the purpose of reviewing such matters and completing necessary adjustments. Such adjustments shall be effective only after the date on which the corrections are made. Company records shall thereafter

be corrected and a new seniority list published.

6. This Decree does not pertain to or affect the issues presented by the Complaint with respect to Ozark's weight policies for flight attendants.

7. The parties hereby agree that to the extent the Collective Bargaining Agreement may be inconsistent with Section II, Paragraphs 1 through 5 of this Decree, said agreement is hereby modified to conform to this Decree; provided, however, nothing in this Decree shall operate to change the collective bargaining rights of the parties nor prevent ALPA and Ozark from pursuing normal collective bargaining related to areas covered by this Decree so long as nothing done therein shall be inconsistent with this Decree.

ORDERED THIS 21st DAY OF MARCH 1978.

/s/George N. Leighton
George N. Leighton
United States District Judge

Agreed and Consented to by:

OZARK AIR LINES, INC.

By: /s/Jerry T. Redfern

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

By: /s/Stephen B. Moldof